

NO. CAAP-14-0000581

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

MAPUANA M. MACDONALD; CHELSIE ANN K.K. MORITA;  
MIKEL THOMAS K. MORITA; KENDRA C. SHIM, Plaintiffs-Appellants,  
v. CARDINAL MAINTENANCE SERVICE, INC., a Michigan Corporation;  
ARNOLD GOMES, Defendants-Appellees, and  
JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10;  
DOE CORPORATIONS 1-10; DOE "NON-PROFIT" CORPORATIONS 1-10;  
DOE LIMITED PARTNERSHIPS 1-10; DOE LIMITED LIABILITY  
COMPANIES 1-10; DOE GOVERNMENTAL ENTITIES 1-10; and  
DOE ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 11-1-0642)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Leonard and Ginoza, JJ.)

Plaintiffs-Appellants Mapuana M. MacDonald, Chelsie Ann  
K.K. Morita, Mikel Thomas K. Morita, and Kendra C. Shim  
(together, **Appellants**) appeal from the February 18, 2014 Order  
Denying Plaintiffs' Motion Pursuant to Rule 60(b)(3) of the  
Hawai'i Rules of Civil Procedure [(**HRCP**)] for Relief from Final

Judgment [(**Judgment**)] Filed on May 16, 2013, Filed on December 23, 2013 (**Order Denying Relief**), in the Circuit Court of the First Circuit (**Circuit Court**).<sup>1</sup>

Appellants raise two points of error on appeal:

(1) The Circuit Court erred in denying Appellants' HRCF Rule 60(b)(3) Motion for Relief by basing its ruling on an erroneous view of the evidence; and

(2) The Circuit Court erred by disregarding rules or principles of law or practice to the substantial detriment of Appellants when it applied the incorrect standard to Appellants' HRCF Rule 60(b)(3) motion by requiring a showing that the ultimate result of trial would have been different absent the misrepresentation.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Appellants' points of error as follows:

(1) Appellants argue that they established: (1) by clear and convincing evidence that Defendant-Appellee Cardinal Maintenance Service, Inc. (**Cardinal**) obtained its defense jury verdict through fraud and/or misrepresentation; and (2) that the false testimony of Arnold Gomes (**Gomes**), the operations manager for Cardinal, and defense counsel Jeffrey Sia's (**Sia's**) closing argument, which was based on that false testimony, prevented Appellants from fully and fairly presenting their case.

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<sup>1</sup> The Honorable Gary W.B. Chang presided.

It is well settled that the trial court has a very large measure of discretion in passing upon motions under Rule 60(b) and its order will not be set aside unless we are persuaded that under the circumstances of the particular case, the court's refusal to set aside its order was an abuse of discretion.

Kawamata Farms, Inc. v. United Agri Prod., 86 Hawai'i 214, 256, 948 P.2d 1055, 1097 (1997), (quoting Hawai'i Hous. Auth. v. Uyehara, 77 Hawai'i 144, 147, 883 P.2d 65, 68 (1994)); see also Moyle v. Y & Y Hyup Shin, Corp., 118 Hawai'i 385, 402, 191 P.3d 1062, 1079 (2008) (denial of HRCF Rule 60(b) motion reviewed for abuse of discretion).

HRCF Rule 60, entitled "Relief from Judgment or Order" states, in subsection (b)(3): "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic),<sup>[2]</sup> misrepresentation, or other misconduct of an adverse party[.]" To obtain such relief, the movant must satisfy a two-prong test which requires that the movant "(1) prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct [and] (2) establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense." Kawamata, 86 Hawai'i at 252, 948 P.2d at 1093.

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<sup>2</sup> "Extrinsic fraud occurs when a party unfairly prevents another from obtaining a fair hearing or presenting a full claim or defense. Intrinsic fraud includes perjury, falsified evidence, and other false claims or defenses arising during the course of litigation or arbitration." Low v. Minichino, 126 Hawai'i 99, 106, 267 P.3d 683, 690 (App. 2011) (citations omitted).

"[C]lear and convincing" evidence may be defined as an intermediate standard of proof greater than a preponderance of the evidence, but less than proof beyond a reasonable doubt required in criminal cases. It is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable.

Kekona v. Abastillas, 113 Hawai'i 174, 180, 150 P.3d 823, 829 (2006) (quoting Masaki v. Gen. Motors Corp., 71 Hawai'i 1, 14-15, 780 P.2d 566, 574-75 (1989)).

Appellants submit that the primary issue at trial was whether Cardinal breached its duty to Appellants by failing to prune an ironwood tree prior to the subject incident, and that the facts at trial established: that Cardinal was at the beach park a month before the incident; that Cardinal had a duty to prune trees for safety of the public; that the subject ironwood tree posed a danger; that Cardinal should have known of the danger; that, therefore, Cardinal had a duty to prune the ironwood tree; that there would not have been any reasonable basis to contact the Navy before performing the safety cut; and that its failure to prune it was a breach of that duty.

Appellants point out that Cardinal did not call an arborist at trial to rebut the testimony of Appellants' expert witness, Steve Nimz (**Nimz**) (a certified arborist or tree specialist), but only called Gomes. Gomes maintained that, for the definite or fixed portion of Cardinal's tree-trimming contract with the Navy (**Contract**), Cardinal only was required to prune to a certain height to meet Contract specifications and, even after being shown the Contract, Gomes stated that he knew the language was in the Contract someplace and that he thought

the height limit was ten feet. However, when asked "for the contract specs," Gomes responded "[n]o I can't say I can find it." Appellants then argue that the subsequent deposition in the related federal case (**Federal Case**) of the Navy's designated agent, Gail Akemi Tazawa (**Tazawa**), establishes that there is no such limitation in the Contract; thus Gomes's statements were false. Appellants also submit that:

The cornerstone of [defense counsel]'s closing argument on the issue of liability was that the pruning cuts Plaintiffs claim Cardinal should have made to the subject tree were **outside Cardinal's duties under the fixed portion of the contract and could only be undertaken as IDIQ work specified by EMALLs.**

(Emphasis added.)

Appellants argue that "Cardinal's closing argument on liability focused on Mr. Gomes' false testimony," and that Sia "clearly represented to the jury that pertinent specifications pertaining to Cardinal's tree pruning responsibilities under the fixed price portion of the contract were contained in portions of the 235 page contract that had not been given to Mr. Nimz." Accordingly, Appellants contend that the clear and convincing evidence before the court on the Rule 60(b) motion was that Cardinal introduced false testimony through Gomes, which defense counsel repeatedly referred to in his closing argument, and thus, the defense obtained its verdict through fraud and/or misrepresentation.

This argument is without merit. Appellants do not show that, rather than being honestly mistaken about the written terms of the Contract, Gomes knew that there were no height limits

anywhere in the Contract, but that he nonetheless testified to the contrary. As the Circuit Court stated, "it's very difficult for this court in light of that little equivocal language by Mr. Gomes to find that he intentionally misrepresented." In addition, the Contract was in evidence. Appellants had the opportunity to thoroughly cross-examine Gomes concerning the terms of the Contract or otherwise rebut Gomes's testimony about the terms of the Contract. Although Tazawa's deposition in the Federal Case included testimony that Gomes's trial testimony about the terms of the Contract was incorrect, we cannot conclude that the Circuit Court abused its discretion in declining to set aside the jury verdict based on the argument that Tazawa's deposition testimony constituted clear and convincing evidence that Cardinal committed fraud in obtaining the verdict.

(2) Appellants argue that the court erred in holding them to an "outcome determinative" standard in considering their motion for relief when the court stated that the jury could have considered other factors in reaching their verdict, outside of Gomes's allegedly false statements.

The Hawai'i Supreme Court has held that a trial court can decline to grant relief from judgment under HRCF Rule 60(b)(3) on the basis that the losing party has not shown how the alleged fraud or misrepresentation "affected the outcome of the case." Moyle, 118 Hawai'i at 403, 191 P.3d at 1080. Accordingly, this argument is without merit.

For these reasons, we affirm the Circuit Court's  
February 18, 2014 Order Denying Relief.

DATED: Honolulu, Hawai'i, June 3, 2016.

On the briefs:

Laurent J. Remillard, Jr., Don V. Huynh, Rechelle A.M. Barbour, (Remillard & Huynh) for Plaintiffs-Appellants.	Presiding Judge     Associate Judge
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Jeffrey H.K. Sia, Diane W. Wong, David A. Gruebner, (Ayabe, Chong, Nishimoto, Sia & Nakamura) for Defendant-Appellee.	Associate Judge
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